An out-of-court settlement reached in such a case is what is called *soshoukeiyaku* in Japan. *Soshoukeiyaku* is a contract between two parties to a dispute, which settles a pending action at some points. In bygone days such a contract was essentially unlawful, but nowadays, many academics have come to accept them as legal. When discussing the issue of whether an agreement to discontinue an action, which is another type of *Soshoukeiyaku*, is legally binding or not, there were some academics who took the view that the effects of an agreement to conclude an action were limited to private law but not to procedural proceedings (*shihoukeiyaku-setsu*). Other academics took an opposing view, claiming that such an agreement is binding both in private law and procedural proceedings (*soshoukeiyaku-setsu*). With regard to the former theory, a party to the dispute has an obligation to withdraw his/her action, and thus the court can dismiss the claim without prejudice. However, with respect to the latter theory, a party is required to prove the existence of the agreement. When the claim is accepted by the court, the court gives a judgment terminating the proceeding. The court supported the first theory, *shihoukeiyaku-setsu*, in a judgment made by Supreme Court 2nd P.B., October 17, 1969 Case No. (O) 770 of 1969, 241 HANREI TAIMUZU 71.

Moving on to the topic which is discussed in this case, whether or not an out-of-court settlement made after the appeal has been lodged is legally binding, the court decided to apply the same doctrine as in the judgment of 1969. Therefore, having established the existence of the agreement, the court dismissed the claim without prejudice. Additionally, an out-of-court settlement by which two parties aim to confirm a former adjudication is final and binding. An agreement to withdraw a claim might damage a right to submit a case to the court; however, in this case, the parties have already been given a decision by the court and thus no right to bring a dispute to the court would be harmed.

5. Criminal Law and Procedure

Ex parte *X*
Supreme Court 1st P.B., December 19, 2011

Case No. (*shi*) 145 of 2010
1546 SAIBANSHO JIHO 14; 1365 HANREI TAIMUZU 70

Summary:

A case in which the Supreme Court acknowledged that, when a Family Court cannot recognize the existence of a fact of delinquency on the date found in its ruling on a protective measure, but can recognize both the existence of the fact of delinquency on another date which consists of the same contents as the former fact, and then the identity of these two facts, this court does not have to rescind the protective measure pursuant to the provision of the Juvenile Act, Article 27-2, Paragraph 2.

Reference:

Juvenile Act, Article 27-2, Paragraphs 1 and 2.

Facts:

On January 7, 2002, in the juvenile protection case of attempted rape, a petitioner *X* was given a ruling that he would be referred to a middle juvenile training school. According to the fact of delinquency that was found in this ruling, though *X* had conspired with his 9 accomplices to commit sexual intercourse with a then-15-year-old high school female student and attempted to do so forcibly by assaulting her jointly with his accomplices and suppressing her resistance in the Gotemba City Central Park in Gotemba City, Shizuoka Prefecture, between around 9:50 p.m. and around 11:00 p.m. on September 16, 2001, he could not have accomplished his aim.

Although *X* insisted on his innocence and denied the fact of his delinquency at the time of his arrest, he began to accept this fact in the course of criminal investigation. In the hearing of a Family Court, also, he kept up such a confession, and was given the said ruling on a protective measure. This ruling became final and binding without complaint. *X* was committed to a middle juvenile training school under this ruling. After being under probation during his release on parole, he completed the execution of the protective measure on September 9, 2005.

The victim of this case altered the contents of her statement in his accomplice's criminal trial proceedings that were conducted after the said

ruling on protective measure became final and binding. In these proceedings, she stated that, though it was certain that she had been the victim of attempted rape, the victimized date was not that of "September 16, 2001" which she had initially adduced, but that of "September 9, 2001" which is one week prior to the former. As a result, *X* filed a petition for the rescindment of the said protective measure, on the arguments that the fact of delinquency on attempted rape that was found in the said ruling on protective measure did not exist, and that he had an alibi on September 9, 2001.

In the first instance, in the light of *X*'s arguments, at the outset of the first hearing date, the court informed him of the summaries of the fact of delinquency that had been found in the said ruling on protective measure and also the fact of attempted rape committed on September 9, 2001, which consisted of the same contents as the former fact, and gave him an opportunity to make a statement. Even after that, the court conducted proceedings exclusively relating to the fact of attempted rape committed on that date, and made *X* offer rebuttals including the proof of his alibi. Then, in the ruling of the first instance (Numazu branch of the Shizuoka Family Court, June 5, 2009), the court stated that, as a result of its proceedings, it could not find the fact of attempted rape of the said victim on September 16, 2001, but could find the fact of attempted rape on September 9, 2001 which consisted of the same contents as the former fact, and dismissed *X*'s petition for the rescindment of the said protective measure. After this ruling, he filed a complaint against it with a High Court because of errors in fact and the application of laws.

In the original ruling (Tokyo High Court, March 15, 2010), the court endorsed the fact finding in the ruling of the first instance. According to this original ruling, since a set of facts, such as the victim, the scene of the crime, his accomplices, the circumstances that led him to commit the crime, the mode of the crime, and so forth, on September 9, 2001 are identical to those on September 16, 2001, and there is an overlap also between the time periods of the crime on these both dates, the facts on these both dates are basically identical, and incompatible. Therefore, even though the attempted rape of the said victim had been committed on September 9, 2001, and this date was different from that of "September 16, 2001" which had been found in the said ruling on protective measure, the

court could recognize the identity of the facts on these both dates, it stated. It added that, in the first instance, its court had carried out sufficient hearing proceedings to guarantee *X*'s right to defense, such as having him make enough statements including the allegation of his alibi. Consequently, in the original ruling, the court concluded that the ruling of the first instance in which its court had found the fact of attempted rape committed on September 9, 2001 and dismissed *X*'s petition for the rescindment of the said protective measure was appropriate. As a result, he filed a further complaint against this original ruling with the Supreme Court.

Opinion:

Complaint dismissed.

It is appropriate to interpret the "grounds for which a person should be subject to hearing and decision" in the Juvenile Act, Article 27-2, Paragraph 2 to include the fact which is identical to the fact of delinquency found in a ruling on a protective measure and can be assessed as with this fact in terms of the constituent elements of a crime. Therefore, when a Family Court cannot recognize that a fact of delinquency found in its ruling on protective measure exists on the date found in the ruling, but can find the fact of delinquency which consists of the same contents as the former fact and exists on another date and that, since these two facts are incompatible and basically identical, there is the identity of those facts, the court can decide that the "grounds for which a person should be subject to hearing and decision" have existed. Thus, it does not have to rescind the protective measure pursuant to the provision of the Juvenile Act, Article 27-2, Paragraph 2.

Furthermore, in the case of a petition for the rescindment of the protective measure, it is necessary for the court to give the petitioner an opportunity to defend him or herself, in order to find a different fact of delinquency from that found in its ruling on protective measure within the identity of these two facts. As for the case in question, in the first instance, when the court found the fact of attempted rape on another date which consisted of the same contents as that found in its ruling on the protective measure and which was recognized to be identical to it, the court informed *X* of the summaries of these facts and heard his statements, and then had

him offer rebuttals including the proof of his alibi, on the hearing dates. Although a considerable period of time had elapsed after the ruling on protective measure, the court gave enough him an opportunity to defend, and thus there is no illegal defect in the hearing proceedings of the first instance.

Therefore, the original ruling in which, from the view of the same effect as this, the court decided that the case in question did not fall under the cases where the protective measure shall be rescinded pursuant to the said provision is in the right.

Editorial Note:

This is the first case of the Supreme Court in which the court has handed down an opinion on the question of whether to accept the rescindment of a protective measure when there is an error in a part of one fact of delinquency found in the ruling on a protective measure. In this Supreme Court's ruling, as noted above, the court made it clear that, when a Family Court cannot recognize the existence of a fact of delinquency on the date found in its ruling on a protective measure, but can find both the existence of the fact of delinquency on another date which consists of the same contents as the former fact and then the identity of these two facts, this court does not have to rescind the protective measure pursuant to the provision of the Juvenile Act, Article 27-2, Paragraph 2. We can see that the Supreme Court presented the legal principle that the protective measure does not need to be rescinded when the court can switch its finding from the fact of delinquency found in the ruling on protective measure to one which is incompatible and basically identical with the former fact and can be assessed as with this fact in terms of the constituent elements of a crime.

6. Commercial Law

X v. Y
Supreme Court 3rd P.B., April 19, 2011
Case No.(kyo)30 of 2011